No. 77-1419

In the Supreme Court of the United States

OCTOBER TERM, 1977

GRIFFIN B. BELL, ATTORNEY GENERAL OF THE UNITED STATES, ET AL., PETITIONERS

v.

SOCIALIST WORKERS PARTY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL APPENDIX TO THE PETITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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At a hearing held on April 11, 1978, District Judge Griesa—who is among the respondents in this case because we sought a writ of mandamus in the court of appeals—criticized the contents of the petition for a writ of certiorari. Judge Griesa stated that we had not accurately and fully described the reasons he gave for his actions and the status of discovery. We have attached as a supplemental appendix the transcript

of the April 11 hearing. We also attach the transcripts of the hearings of May 31, 1977, and June 22, 1977, in response to Judge Griesa's request that they be made available to the Court.[1] After the plaintiffs have filed their memorandum in response to the petition, we will address both Judge Griesa's remarks and any arguments the plaintiffs may make.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

APRIL 1978.

[1] During the proceedings on April 11, Judge Griesa referred to numerous other transcripts that, in his view, bear on the issues before this Court. Some of these transcripts pertain to proceedings after the case was in the court of appeals and thus are not part of the record that would be before this Court. The other transcripts pertain to related matters but not to the disclosures at issue here, and we have elected not to file the entire record of these lengthy proceedings. See Rule 21(1) of the Rules of this Court.

APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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73 Civ. 3100

SOCIALIST WORKERS PARTY, ET AL., PLAINTIFFS,

—against—

ATTORNEY GENERAL OF THE UNITED STATES, ET AL.,
DEFENDANTS.

April 11, 1978—10:15 a.m.
New York, N.Y.

Before:

HON. THOMAS P. GRIESA,
District Judge

APPEARANCES:

BOUDIN, RABINOWITZ & STANDARD, Esqs.
Attorneys for Plaintiffs

By: LEONARD BOUDIN, Esq.
MARGARET WINTER, Esq.
MARY PIKE, Esq.

ROBERT B. FISKE, JR., Esq.
United States Attorney for the
Southern District of New York

By: THOMAS E. MOSELEY, Esq.
STUART PARKER, Esq.
FRANK WOHL, Esq.
Assistant United States Attorneys

THE COURT: Good morning.

MR. MOSELEY: Good morning, your Honor.

THE COURT: I received a copy of the certiorari petition. Although I believe I technically was a respondent in the Court of Appeals matter and perhaps I am still a respondent, I don't know what the et al. covers, but anyway I obviously took no part in the Court of Appeals proceeding and had no desire to do so. It is up to the litigants to handle review proceedings of whatever nature. I take the same view as far as the Supreme Court proceeding: it is up to the lawyers for the litigants. I would take that view unless there was some unusual reason for me to do otherwise, and I think I would have a right to do otherwise. I don't see any reason yet to take that view at all.

The only thing that I wanted to speak to you about this morning is that I think that, because of the time pressures or communications difficulties between Washington and New York, I think there are some things in the certiorari petition which I would think the Government might wish to correct. I don't have any quarrel with advocacy, and people have different views of the facts, and that is really for the litigants to sort out on different interpretations. But there are some things that I think are really unfair to the Supreme Court, and, in fairness to the judicial process, I cannot in good conscience sit back without calling some things to your attention.

On page 2 there is a section entitled "Opinions Below" and there is a statement that "The district

court did not render an opinion concerning the present issues," and then there is a reference to a prior opinion of the district court. That is the one back in 1974 about the preliminary injunction motion.

It is simply incorrect that the district court did not render an opinion concerning the present issues. I rendered an opinion, which was the subject of the proceeding in the Second Circuit. It is a bench decision, but bench decisions are rendered all the time. I assume the Government will correct that and comply with the Supreme Court rules which require the attachment of that opinion, and indeed other opinions.

MR. MOSELEY: Your Honor, if I may be heard, we would prefer to have your Honor's comments as they come now seriatim, and after that I think that we will be in a position to respond to your Honor's concerns, unless your Honor believes that the comments are—

THE COURT: No, I don't call for comments. I did not mean to indicate you were required either now or at this hearing to comment. I am really just addressing you with my comments, and it is up to you what action you take.

MR. MOSELEY: We may wish to comment at the conclusion of the proceedings.

THE COURT: All right.

The Supreme Court Rule 23(1)(i), which specifies what has to be included and appended to a petition for certiorari, states: "There shall be appended to

the petition a copy of any opinions delivered upon the rendering of the judgment or decree sought to be reviewed, including all opinions of courts or administrative agencies in the case, and, if reference thereto is necessary to ascertain the grounds of the judgment or decree, opinions in companion cases."

I think the United States Attorney's Office is well aware that the mandamus in the Court of Appeals specifically related to my bench ruling of May 31, 1977, and the Government has, of course, the transcript and my bench opinion appears at page 4 through 26.

In addition, the matter of the FBI informants was only part of an overall privilege question which was presented with regard to the FBI, the CIA, and the NSA. It would seem to me that within the spirit and intention of the Supreme Court rule, the opinions on the NSA and CIA issues are also pertinent, directly pertinent.

As you know, there was a public opinion filed, dated June 10, 1977, and a sealed opinion filed June 10, 1977, and the sealed opinion at pages 15 through 17 specifically deals with the distinctions which I found between the way the CIA and NSA matters should be handled, on the one hand, and the FBI matters, on the other hand.

The certiorari petition neither referred to nor enclosed any of those opinions.

Going back to the bench ruling about the FBI, the May 31 bench decision was briefly supplemented in the transcript of June 22, 1977, on page 11, beginning line 14, through page 14, line 18. I recall that the Government suggested that they should have additional time to file a mandamus petition, because they wished to take into account the supplementary material in my statement of June 22.

So the Government is well aware that that June 22 transcript in brief part contains an essential part of my bench ruling on the FBI question.

The certiorari petition does quote the district court, a statement which is quoted as follows: That the district court was "reasonably convinced that the identity of the individuals in all, virtually all, cases would be useless to [him] as a judge or to the parties to the litigation."

That statement is quoted in the certiorari petition.

MR. BOUDIN: On page 12, your Honor.

MR. MOSELEY: It is first quoted, your Honor, at page 4.

THE COURT. Quoted at page 4, quoted at page 12, and it may be quoted at one or more other places. It was referred to frequently.

That comes from a transcript of April 14, 1977, and the petition for certiorari fails to state that that is the transcript it comes from and that that was some six weeks or so before the actual ruling. The actual ruling, of course, is not either quoted or even attached.

The April 14 transcript might well be, in fairness to the Supreme Court in its examination of the issues, a transcript which should be attached, because it contains a summary analysis of the eighteen files which

I stated on the record and which was a prelude for the ruling that I gave on May 31. I am referring to the transcript of April 14, from pages 2 through 13, line 18, on page 13. In addition to that, it would put the statement about the names in some context.

For reasons which I think may appear in a minute, I would also suggest that the issues sought to be discussed in the certiorari petition could be discussed more accurately if reference was made to two other transcripts, namely the transcript of November 3, 1977, page 2, line 3, to page 21, line 22, and the transcript of January 27, 1978, page 2, line 3, through page 31, line 11. Obviously, it is a matter of judgment and it is not up to me, but it is difficult to understand why two opinions from 1974 are included where the ones from 1977 and early 1978, which directly bear on the points under discussion, are entirely omitted.

Also the petition failed to include the order of the Court of Appeals denying rehearing en banc, although the order of the Court of Appeals denying rehearing by the original panel was included.

There are statements at page 4 and page 13 which state that the respondents have had broad discovery by way of interrogatories, depositions and production of documents—that is page 4—and then at page 13, starting at the very bottom of page 12, it says: "The way in which these informants were used has been exhaustively canvassed in discovery that has included nine sets of interrogatories directed to the FBI, the

depositions of at least 18 federal officials, and the disclosure of more than 70,000 documents."

It may be that there were nine sets of interrogatories, depositions of 18 federal officials, and 70,000 documents produced, but the point is, as the Government very well knows, that if that is to imply or indicate to the Supreme Court that these informant files would be cumulative of other materials, the Government knows full well that that is simply not the case and has never been considered to be the case. We have gone over that before. I cannot understand how such a representation could be included in a certiorari petition.

The Government is fully aware of the transcripts. The proceedings of May 4 and 5, 1976, contain extensive discussion of the discovery with respect to FBI informants, and it was expressly agreed that the interrogatories should be used as an initial device to see what information could be obtained, and the whole question of whether the plaintiffs would move for production of some or all of the informant files was expressly agreed to be deferred.

The Government is fully aware that the answers to interrogatories were never intended to take the place of documentary evidence, although the Government reserved its right to assert the privilege claims which it has now made. No interrogatory answers, depositions, or documents produced thus far provide the information or evidence contained in the FBI informant files.

This matter was reviewed by me with the Government following the Court of Appeals decision, and the transcript is October 21, and I don't have that at the moment, I will get it, but I made a detailed review of the exact status of the discovery as to FBI informants, and it is my memory that Mr. Moseley on the record agreed basically with my summarization and made no objection to it. I think it might behoove the Government to review these transcripts in connection with the representations and indications in the certiorari petition. Moreover, entirely omitted from the certiorari petition is the procedural history of what happened following the submission of the interrogatory answers. The interrogatory answers were originally submitted in June 1976—I am talking about the first set, I believe.

MR. MOSELEY: Answers were served, your Honor, in June of 1976.

THE COURT: Right. And I think that was the first set of answers about the informants.

MR. MOSELEY: Yes.

THE COURT: There were subsequent developments. As you know, the matter of Mr. Redfern, the Denver informant, came to light in July and indicated that the answers to interrogatories about Mr. Redfern were incorrect. In August and September 1976 there was a procedure by the FBI to have all interrogatory answers checked, and I believe that for each answer the agent who had prepared the answer submitted a supplemental affidavit. I don't know how many changes were made, but there were

many changes made in the answers originally submitted.

In early August 1976, after this problem had arisen with the interrogatory answers, Mr. Boudin made his motion for production of the nineteen informant files in question in this present proceeding. Then not only was there the first set of supplemental affidavits referred to above, which was filed in August and September 1976; it is also true that on October 18, 1976, a second supplemental set of affidavits was filed regarding the nineteen informants who were the subject of Mr. Boudin's motion. These supplemental affidavits contained further emendations to the interrogatory answers for the informants who were the subject of Mr. Boudin's motion.

Thus, the Government is well aware that none of the depositions and document production thus far was intended to cover the FBI informant question. And, as to the interrogatories, which were intended to be the device by which discovery on the informant issue should start, the scope of these interrogatories was necessarily limited and serious questions about the accuracy of the answers arose.

I now have the transcript of October 21, and I refer counsel to the material beginning at page 22, Mr. Moseley's statement on page 23, line 12, where he says, "That is generally correct," in reference to my summarization of the informant discovery matter.

At page 6 of the certiorari petition there is a statement about the statute of limitations possibly being an absolute defense. Then at the very end of the cer-

tiorari petition, page 14, it says: "There is no reason why the district court should direct disclosure of informants' identities in advance of determining that the disclosure is necessary and in advance of considering legal questions that would obviate any need for discovery." I focus for the moment on the last phrase, which uses the wording "in advance of considering legal questions that would obviate any need for discovery."

That is not correct. The Government made a lengthy motion to dismiss major portions of this action, whatever it thought could be dismissed. That motion was exhaustively briefed and argued and considered by the Court, and it was denied on July 29, 1976. The transcript reflects that ruling.

At that time the district court stated—this is contained at page 66 of the transcript of July 29—that it would consider having a preliminary trial on the statute of limitations, although the Court ruled that on the record then existing there could be no dismissal of the action on that ground. The Court invited an application for a preliminary trial.

To my knowledge—and I would certainly be happy to stand corrected, because the record is very full—I know of no application at any time by the Government for a preliminary trial until the Government's letter of October 19, 1977, after all the discovery proceedings about the informants had been completed and after the Court of Appeals had rendered its decision of October 11.

MR. MOSELEY: Your Honor, I might add that the transcript of April 14—

THE COURT: I was about to cover that.

MR. MOSELEY: Yes.

THE COURT: The Government on April 14 did not apply for a preliminary trial. That is in the transcript at page 44. I stated at the bottom of that page that I would not have a partial trial, but obviously, since nobody had applied for one, it was hardly appropriate to hold one. In any event, that subject came up after almost all the work on the informant issue had been carried out. If the Government had wanted a preliminary trial, the invitation was clearly to apply for one promptly in the fall of 1976. The Government never made such application.

None of these matters are indicated in the certiorari petition, and obviously the statement at page 14 is totally incorrect.

In addition to the ruling of July 29, 1976, it should be noted, as the Government well knows, that following Judge Van Graafeiland's decision, the Second Circuit's decision, the district court reviewed at length this question of whether there was some preliminary legal issue which would dispose of the case and eliminate the need for discovery. That review was made, and the results of that review were placed on the record on November 3, 1977. This was in direct response to the comments of Judge Van Graafeiland about the possibility of the preliminary legal issues being dispositive. In that transcript I went over the existing record and explained again why I

felt that the existing record did not justify dismissal of any part of the complaint.

However, I stated that, following the production of the eighteen files which were the subject of the motion, I would consider any possible means to expedite the trial and make it more efficient, including even at some point a preliminary trial on the statute of limitations if that was appropriate.

At page 4 of the petition states that the district court has declined to determine whether the files were privileged or even whether respondents had established a strong showing of need for the names.

Incidentally, the Government is well aware that I did not order the disclosure of the "names" as such, and indeed that I denied Mr. Boudin's motion for disclosure of the names of the 1,300 informants. In connection with this case, a disclosure of "names" as such would have a different purpose from a limited production of files in the manner directed. The files disclose the types and extent of informant activities for which the plaintiffs claim the FBI is responsible. The record shows, for instance in the April 14, 1977 transcript, the repeatedly stated purpose of the district court to develop this evidence as much as possible through statistics and other summaries with a minimum of public disclosure of informants' identities. This was one basic purpose of the ruling of May 31, 1977, providing for confidential production of 18 files. In any event, if the Government is not seeking to confuse or mislead the Supreme Court, I do not understand why accurate language is not used.

Going on, at page 12, footnote 11: " . . . the district court has declined to make any ruling after in camera review concerning the claim of privilege, and the court has emphasized that it will not heed the court of appeals' request to reconsider its decision."

Then at page 14, in footnote 14, there is language about "wholesale delivery of files to counsel in advance of a finding, as a result of in camera inspection, that additional assistance was needed concerning a particular document or portion of a document."

Finally, at the very end of the petition there is the statement about the district court directing disclosure in advance of determining necessity.

I don't want to argue the merits of my determinations, but the omission of the district court opinion and the other relevant statements from the certiorari petition surely constitutes the omission of essential items bearing on the question of whether the district court did or did not consider proper factors.

Any comments?

MR. MOSELEY: Your Honor, we appreciate this opportunity, and we will of course, as soon as this transcript is typed and delivered to us, convey your Honor's comments to the Solicitor General. I don't think any further comments are really in order or appropriate at this time. I am certain that, as the case unfolds before the Supreme Court, Mr. Boudin will have arguments with respect to the petition, and the matter which is on the particular narrow issue which is raised in the Supreme Court will be fully briefed.

THE COURT: What is the particular narrow issue?

MR. MOSELEY: The narrow issue, your Honor, is really the question of appealability of an interlocutory order such as yours and whether it can be appealed on an interlocutory basis, as we had suggested under the unique circumstances of this particular case.

THE COURT: Then what is the purpose of having the material at Section 2 from pages 12 to 14? That is not talking about the narrow issue of the type of appellate review; that is talking about the actions of the district court.

MR. MOSELEY: I think that that is considered as necessary background.

THE COURT: It is just background.

MR. MOSELEY: With respect to this. That is all I have, your Honor.

MR. BOUDIN: I just wanted to say that I appreciate your Honor's observations. Obviously, I read the petition, came to a number of conclusions which will appear in my opposing memorandum, but I join with the Government in expressing appreciation, because this is a continuing case before your Honor. This is not an appeal from a final judgment. I think your Honor's observations—I hope—will be taken into consideration by the Government. If they are not, I will act accordingly. Thank you, sir.

MR. MOSELEY: I just wanted to note for the record, your Honor, that we will pass your Honor's considerations on, without necessarily agreeing or

disagreeing with them or necessarily agreeing or disagreeing with any characterization that your Honor makes.

THE COURT: Does the United States Attorney's Office have no role in the preparation of a certiorari petition?

MR. MOSELEY: Your Honor, the ultimate responsibility for that preparation rests with the Office of the Solicitor General. We have naturally been in consultation with them, but they have—

THE COURT: Did you see a draft in advance of the filing?

MR. MOSELEY: We discussed, we did consult with them, your Honor, in that connection.

THE COURT: Did you see a draft in advance of the filing?

MR. MOSELEY: We consulted with them in connection with the draft prior to the filing.

THE COURT: Did you see a draft in advance of the filing?

MR. MOSELEY: Yes, your Honor, that is what I just said.

THE COURT: Did you see this present material before it was filed

MR. MOSELEY: Yes, I did, your Honor.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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73 Civ. 3100

SOCIALIST WORKERS PARTY, ET AL., PLAINTIFFS,

—against—

ATTORNEY GENERAL OF THE UNITED STATES, ET AL., DEFENDANTS.

New York, N. Y.
May 31, 1977—1 p.m.

Before:

HON. THOMAS P. GRIESA,
District Judge

APPEARANCES:

RABINOWITZ, BOUDIN & STANDARD, Esqs.
Attorneys for the Plaintiffs

By: LEONARD B. BOUDIN, Esq.
HERBERT JORDAN, Esq.
MARGARET WINTER, Esq.
MARY B. PIKE, Esq.

ROBERT B. FISKE, JR., Esq.
United States Attorney for the
Southern District of New York

By: WILLIAM S. BRANDT, Esq.
THOMAS MOSELEY, Esq.
STUART PARKER, Esq.
Assistant United States Attorneys

ALSO PRESENT: MR. SYD STAPLETON

THE COURT: I would like to have this hearing considered to be an in camera hearing on the same basis as the hearing of May 19, 1977, although the people here are more in number than the May 19 hearing.

We have here, in addition to Mr. Boudin, Mr. Jordan, we have Ms. Winter, and then—

MS. PIKE: Ms. Pike.

THE COURT: Who are, I take it, members of the bar of this court.

MR. BOUDIN: For purpose of this case they are members of the bar.

THE COURT: Ms. Winter, you were introduced before. Just refresh my memory. You are a member of what bar?

MS. WINTER: I am a member of the DC bar and about to be admitted to New York.

THE COURT: I admitted you to the bar of this court for purposes of this case, is that right?

MS. WINTER: That is correct.

THE COURT: Ms. Pike?

MS. PIKE: My situation is the same, your Honor, except I have not taken the New York bar, but I have been admitted for this case only.

THE COURT: And you are a member of the DC bar?

MS. PIKE: That is correct.

THE COURT: And Mr. Stapleton of the SWP is here. Then, of course, Mr. Moseley and Mr. Brandt and Mr. Parker for the Government.

The meaning of having this in camera is this, and I want this agreed to, although I certainly have the power to direct it, but I certainly want it specifically agreed to by all concerned before we proceed further. I am faced with a situation where, as I explained on May 19, I believe that we may have some conflict between publicity and getting the job done for this case. I have the same reluctance of any judge to try to place any limit on publicity, but in the present juncture that is where I stand. Therefore, I am being careful about the subject of publicity, and in order to talk somewhat more freely than I might otherwise talk, in order to prevent any misunderstandings by way of publicity, I am having a limited number of sessions in camera. That means that anything said today regarding the FBI informant question is to be limited to this room; that nobody present is to disclose the substance of our conversation here today about the FBI informant question to anybody not present, whether that means other members of the SWP or the YSA or the press or anyone else.

Is that understood, Mr. Boudin?

MR. BOUDIN: That is. My colleagues and Mr. Stapleton understand and all agree to it.

THE COURT: I am also going to touch on two other things beside the FBI issue. I am going to

announce to you what I am ruling on the CIA and the NSA issues. I intend to issue with respect to both the CIA and the NSA issues an opinion which will be public, and in addition to that, an opinion which will be sealed. The sealed opinion will go into the matters which have been furnished to me on a classified basis. For the sake of our proceedings today, I want you to know my basic ruling on all three matters-involving the CIA, the NSA and the FBI.

I will not attempt today to discuss with you anything about appellate remedies, although obviously there may be appellate remedies that you will want to consider and that you will want to ask me about.

I am sustaining the Government's objections to the contested discovery items relating to the CIA and the NSA. The Government has objected to certain interrogatories respecting the CIA and certain questions in the deposition of the CIA employee Heffner. I am sustaining the Government's objections with one or two minor exceptions which I will not try to explain. But basically the Government's objections are sustained. I am doing this on the state secret privilege ground. I do not believe that the statutory provisions cited by the Government provide any independent privilege, but I believe that the state secret privilege does apply.

I think as to the NSA there are only about two interrogatories that are in contest, but these are the interrogatories which get into the heart of what is complained about respecting the NSA. Nevertheless

I am sustaining the Government's to both those interrogatories on the ground of state secret privilege.

To all practical purposes, if my ruling is final, this does, as I am fully aware, preclude any real claim in this case about NSA activity. Certain subjects which might be the basis of a claim by plaintiffs about the CIA will not be able to be litigated because of my discovery order, although there are certain other matters involving CIA activity—operation chaos, for instance—about which the Government has voluntarily produced discovery materials.

These factors will be considered by you and ultimately will be considered by the courts in connection with any question of appellate review.

The bulk of what I wish to discuss today deals with the FBI informant issue.

I have decided to direct that the FBI make available to specific attorneys for plaintiffs the files and summaries thereof of the eighteen numbered informants about which we have had discussions. Except by specific court permission, plaintiffs' counsel will confine this information strictly to themselves without revelation to their clients or to anyone else beyond the specified lawyers.

But let me summarize briefly by reasons for directing this procedure. These reasons have already been discussed to a large extent at the in camera hearing of May 19.

I start with the proposition which has been articulated many times, which is virtually conceded, that the principal activity of the FBI vis-a-vis the Socialist

Workers Party and the Young Socialist Alliance was the use of informants. During the period beginning about 1960, up to the discontinuance of the program by the FBI in the fall of 1976, it appears that during this period of time, some 1300 informants were used by the FBI in its investigation of the SWP and YSA. That includes 300 persons who were apparently members of the SWP or the YSA.

The other approximately 1000 would apparently be people such as janitors or employees of banks or employees of schools or other people who were in a position to give information to the FBI, but they did not apparently literally infiltrate the membership of the SWP or the YSA.

It has been recognized for a long time in this case that the informant issue lies at the very heart of the plaintiffs' case as to the FBI. I would venture to say that although there are other Government agencies and officials sued in the case, the cause of action against the FBI is by far the most important phase of the plaintiffs' claims in this entire action.

From the very outset everyone has recognized that the disclosure of the evidence about the informant activity presents a most difficult problem. This has led the plaintiffs to approach the matter in a rather gingerly step-by-step process.

It has led the FBI to strongly object to the production of any information which would lead to the identification of informants who were not otherwise already identified. It has led to extremely cumbersome discovery procedures which have in-

volved the FBI and the Department of Justice in great labor and which have consumed vastly greater amounts of time than would ever be conceived of in the discovery in an ordinary case.

Three basic things have been carried out in connection with discovery on the FBI informant issue. Some time ago the plaintiffs addressed interrogatories to the Government asking for certain specific items of information about the informants. There are some 1300 sets of interrogatory answers supplied, which were gotten together by local offices of the FBI and reviewed to some extent by the Washington office of the FBI and the Department of Justice.

It is a safe to say that for a variety of reasons these answers to interrogatories, although undoubedly requiring great effort of preparation, are totally inadequate to provide the kind of evidence that any competent plaintiff's attorney would wish to have for the pursuit of this case.

The second stage occurred last summer when plaintiffs asked for the production of the FBI files relating to seven informants whose identities plaintiffs had learned. After some initial opposition, the Government consented or did not oppose the production of these files, for the reason that the identities of these persons were already known to the plaintiffs, and therefore, the confidentially simply did not exist. These files were produced to the plaintiffs last summer.

The next stage occurred with the application by the plaintiffs for the production of nineteen addi-

ional files relating to informants listed by number in the answers to interrogatories, but whose identities have not been disclosed. The plaintiffs made a selection of these 19 from the total of about 1300, believing that they would provide a sample somewhat broader and somewhat more representative than the seven informants whose files they obtained last summer. The application for the production of these nineteen additional files was made last August. It was opposed by the Government. An official of the FBI submitted an affidavit explaining the claim of privilege. This affidavit was dated October 4, 1976, This official testified in early November 1976.

The trouble with the presentation at that time was that it all dealt with the general proposition that the disclosure of informants would subject such people to retaliation by the SWP and the YSA and would create a severe psychological problem in the relationship between the FBI and informants in other investigation programs. But no one had reviewed the files in question. Consequently I felt that we were engaged in a somewhat theoretical exercise which did not permit any sensible ruling pro or con on the claim of privilege.

This led me to at first request an opportunity for an in camera review of the nineteen files. This provided me with some information, but the nineteen files were sufficiently voluminous that I realized it would be impossible for me personally or for my law clerk personally or both of us personally to really make any kind of intelligent review of the files.

Consequently, in late November 1976 I asked the FBI and the Department of Justice to provide summaries of the nineteen files answering certain listed questions. This process took far longer than I envisioned, and undoubtedly took a great deal of work, but the summaries were finished in early April.

As I understand it, the Government's objection to one of these nineteen files has been withdrawn, leaving eighteen in contest. The summaries of these files were gotten together in a most painstaking manner and, as far as I could tell, were done with scrupulous accuracy and completeness. I certainly have not checked them out in any complete sense, but on a small spotcheck basis they certainly appear complete and on their face they represent clearly a tremendous effort at completeness and accuracy.

At a hearing of April 14, 1977, I summarized the type of information which was contained in the files. I did this on the public record without disclosing any particulars which would lead to the identification of the specific informants. As the record shows, I did not attempt to make any ruling pro or con on the claim of privilege as to the informant files, these eighteen files in question.

I went ahead at that time and raised with the parties the basic and very important problem as to the handling of the overall informant evidence question in this case. The problem in this case regarding discovery and evidence is not answered by eighteen files or any small number of files. The evidence and discovery problem in this case can only be resolved when

we come to grips with the handling of the information about FBI informants on a comprehensive basis. Ultimately, that involves handling some 1300 informant files in a reasonable way.

On April 14, I made some proposals about having the Government make further extracts from the informant files which might provide evidence for the case with a minimum of identification of specific informants.

This was discussed without ruling finally on the question of the eighteen files in contest.

At the hearing of May 5, Mr. Boudin on behalf of the plaintiffs argued that, for a variety of reasons, no amount of Government summarization of the raw data would suffice. He also made application for the disclosure of the identities of all 1300 informants and indicated that in his view the files themselves would be an impractical means of handling discovery on all 1300 informants because of the immense volume, of the files and the need to conduct independent inquirie, and take depositions.

At either the April 14 or the May 5 hearing I broached the suggestion that perhaps a way to get through our many impasses on this informant issue was to have plaintiffs' counsel be able to review informant files on restricted basis without any disclosure to plaintiffs or to the public. This led to our meeting in camera on May 19. Mr. Boudin at first took the position that he would not agree to review files without being able to discuss the information with a representative of his clients.

Since the May 19 meeting I have had letters from Mr. Boudin dated May 23 and from Mr. Brandt dated May 24 announcing their final positions as to the idea of the restricted review of the FBI informant files by plaintiffs' counsel.

The Government strongly objects to production of any informant files or summaries to plaintiffs' attorneys. Mr. Boudin on behalf of the plaintiffs still takes exception to a restriction which prevents his sharing discovery information with his clients. However, Mr. Boudin's final position is that if the Court orders that the inspection of the FBI informant files be limited to plaintiffs' counsel only, without any revelation of the contents to his clients or representative thereof, he would go forward with such an inspection, and gives full assurance that the restrictions imposed by the court would by completely honored.

I propose to proceed on that basis, that is, directing the production of the eighteen files in question and the summaries thereof to plaintiffs' counsel for their use and their use only, subject to any further order of the Court that might be appropriate at a later time.

My basic reasons for doing this are the following. In the first place, there is a sharp distinction between production of these materials to plaintiffs' counsel on a restricted basis, and the public disclosure of the materials by way of ordinary discovery. This distinction is highly relevant to the objections of the FBI to production of the informant files. The two

basic objections are that such disclosure will lead to the public identification of the informants and a danger of retaliation against them by the plaintiff organization; and that public disclosure of the files, and the identification of the informants, will tend to cause informants in other Government investigations to fear loss of confidentiality, thus jeopardizing these other informant programs.

As to the risk of retaliation against the informants, there is no contention, of course, that plaintiffs' attorneys will engage in such retaliation, I do not mean to imply that plaintiffs themselves would do so. But it is clear that production to plaintiffs' lawyers, in and of itself, simply will not occasion any difficulty regarding retaliation.

With respect to the danger to other Government informant programs, the problem boils down to the theory that if other informants or potential informants learn that the SWP and YSA informants have been identified and subjected to publicity, possible harassment, etc., then the informants and potential informants in the other programs might fear the same would happen to them. However, as already stated, a restricted production of informant files to plaintiffs' counsel simply does not involve the public identification and exposure of the SWP and YSA informants. There can be no headlines in the press about revelation of names of informants or anything of this kind. Even the fact of the procedure being used—that is, production to plaintiffs' attorneys—I

intend to have treated with the maximum of confidentiality.

Thus it is my view that the restricted production of informant files to plaintiffs' counsel involves no interference—or a negligible interference—with legitimate law enforcement and other interests sought to be protected by the FBI and other Government agencies.

The Government contends that there is no sufficient showing of the need for production of the informant files, even on a restricted basis, to plaintiffs' attorneys. I reject this contention.

The files of the FBI regarding the 1300 informants used against the SWP and YSA undoubtedly constitutes the most important body of evidence in this case. They record in immense detail the activities of the informants, the instructions of the FBI, evaluations by the FBI, and so forth.

The extensive infiltration of the SWP and YSA by the FBI's member-informants, and the gathering of information from various kinds of non-member informants, raise serious questions under the federal constitution, as well as other federal and state laws and legal doctrines. There is a serious question as to whether the bulk of these FBI activities had any valid law enforcement purpose. Indeed, in the fall of 1976 the Attorney General ordered the FBI investigation of the SWP and YSA to cease.

The Government contends that discovery of the informant files is unnecessary because the voluntary cessation of the informant program precludes the

need for injunctive relief, and because there are various legal barriers to any recovery of damages, particularly under the Federal Tort Claims Act. On the latter point, I have previously denied a motion to dismiss the claims under the Federal Tort Claims Act, on the ground that the legal issues could not be properly determined without the development of a factual record. I adhere to that ruling. There are indications from the few files thus far examined that there may be a variety of tortious acts which were committed by the FBI, including trespass and conversion of property. The latter refers to removal of private documents for production to the FBI. The FBI and certain informants may have engaged in activities designed to intentionally destroy certain chapters of the SWP and YSA. The evidence about the FBI informants may reveal other activities giving rise to valid claims for damages.

I am not attempting to indicate any view on the ultimate merits of any claim. I am only stating that there are questions which are sufficiently serious to merit thorough exploration of the evidence.

I have reached certain conclusions about the discovery procedure to be used. To a great extent these conclusions are based upon my analysis of the summaries of the 19 informants files now requested by plaintiffs, plus information about the 7 files voluntarily produced last summer. I conclude that there is no legitimate reason for the wholesale public disclosure, in the manner of normal discovery, with respect to all the FBI informant files or the identities

of all the informants. I am convinced that, with careful analysis and preparation, much of the necessary information about the informant activities can be presented at the trial of this action without identifying specific informants. I discussed this to some extent at the hearing of April 14. However, this preparation and analysis cannot possibly be done without the participation of plaintiffs attorneys. Neither the Government nor the Court should be relied upon to develop plaintiffs' case.

It may well be that the files of certain selected informants, and the indentities of these informants, should be publicly disclosed in normal discovery proceedings, and that the evidence about these specific informants should be presented at the trial. There are a variety of reasons why this may be necessary and appropriate. However, the question of whether, and to what extent, this should be done, cannot be decided intelligently without the participation of plaintiffs' attorneys.

Plaintiffs' counsel must have access to the detailed facts about the use of informants. They have to date been denied access to any such detailed information, except with respect to the seven files produced last summer relating to people whose identity in some way had already been disclosed to them. But these seven files are simply inadquate by a very long way, from providing plaintiffs' counsel with proper information about the activities of the 300 member informants as a whole, to say nothing of the other 1000 or so informants who were not members.

The procedure of summarizing, having the FBI or the Department of Justice summarize files, constitutes a deprivation of the plaintiffs' lawyers from anything resembling their normal right to develop their own evidence.

If we go along on some basis where we are relying on summarization by the FBI and the Department of Justice, we are multiplying the burden on the Government enormously and multiplying the time required for any development of the issues by a tremendous degree. In other words, a new process simply has to be instituted. Both the burden and the opportunity of viewing the basic evidence should be and must be in the hands of plaintiffs' lawyers. That is the only way the litigation can proceed from here on out in any sensible fashion.

Let me outline the procedure I have in mind specifically. I want to say at this point that I am starting with the eighteen files, but I want it clearly understood that I envision that the production will not stop with the eighteen files and undoubtedly will go beyond these files. The information contained in the eighteen files is sufficiently valuable and of sufficient importance to indicate that there is valuable and important information, or there should be valuable and important information in various other of the remaining 300-odd files of member informants, and indeed another thousand files for nonmember informants. I intend at the present time to start with the eighteen, and I think this will permit an intelligent discussion by all concerned as to the issue of whether

any of those specific files should be revealed in public discovery, whether there should be depositions taken of the informants, and how to handle in some intelligent, sensible way the information contained in the large number of other files.

I come now to the question of the precise persons who will have access to the files. I have no question about Mr. Boudin and Mr. Jordan, and I am well acquainted with them through the history of this case, and I state flatly that I have no doubt whatever that they will faithfully obey the orders of this Court with respect to confidentiality.

Mr. Boudin has written me in his letter of May 23 expressing his difficulty in having the production limited to two lawyers only, and he has mentioned his need for having the other two lawyers on the case work also. I assume that you are referring to Ms. Pike and Ms. Winter?

MR. BOUDIN: Precisely.

THE COURT: He has stated that Ms. Winter, however, is a member of the Socialist Workers Party. I will come to that in just a minute.

Ms. Pike, I take it you are not a member of any of the plaintiff organization?

MS. PIKE: That is corerct.

MR. BOUDIN: May I just interrupt. We are, four of us, members of the bar. Your Honor does know me and Mr. Jordan. Your Honor has had both other counsel before you on a number of sessions. They are both members of the bar of the District of Columbia, and they have been admitted for purposes of

this case, and I vouch for their reliability. I cannot have a distinction made among counsel who are associated with me in a case and have the Court place a certain value of reliability upon one counsel as against the other. I am the principal counsel, and I am responsible for this case, and I really think that I may have been unwise in indicating a reference to membership by one of my co-counsel in the Socialist Workers Party. So far as we are here, we are here only as lawyers.

THE COURT: I have no problem as far as Ms. Pike. I think that I have observed Ms. Winter, she has appeared before me, and also in fact I think I know her a little better than Ms. Pike. From what I can see, I have the greatest respect. I don't think this is really a matter of personal respect anyway. I don't think that is anything that should enter into it, except if there was a lawyer who I did not have confidence in, I would not engage in this activity.

I must tell you that our problem here is largely with respect to possible publicity, and I am concerned with several things on the question of publicity and just let me mention them.

As to the FBI's fear for other informant programs, we are dealing, as I said before, in a somewhat speculative area. We are dealing with the subject of risk. What risk is run over what length of time by publicity about disclosure by informants? What amount of accuracy or inaccuracy or exaggeration can occur in the press? We all know that that is inherent with the best will in the world. There are things that get

exaggerated or misunderstood, etc. Then for the people who will read this publicity, if it ever occurs, and who might be in the position of the informant or potential informant that the FBI is talking about, the effect of publicity on them, again it is speculative but the risk, it seems to me, is there, and I want to be concerned about it, that you might have people who are sufficiently frightened for one reason or another that the scales are tipped by publicity. That is what I am concerned about.

Now, as to the possibility of leakage resulting from the procedure I contemplate, I really am not concerned about the actual disclosure of informants identities. I just think that whether it is Ms. Winter or any of you or any other group of attorneys, if the order is that you are not to disclose information or names to the press, that just won't be don't period.

MR. BOUDIN: Right.

THE COURT: Let us come to another consideration. With respect to this procedure, the fact that the materials are being disclosed to you as counsel, it is desirable that we go about this procedure in the greatest confidence obtainable. I am going to enter as much of an order as I can to insure that. But I am not under any illusion that there is no chance that the fact of the procedure may become known to the press or be inferred by the press.

And, I am willing to run that risk, frankly, and I think it is very little risk compared with the value of this case of getting the job done. Certainly, under the Roviero case I think the Court has discretion to

run some minimal risk. It is much less of a problem if the press picks up the fact that counsel were given the identities on a confidential basis than if the press could print names of informants.

But I want to consider whether there is some problem if you have a member of the SWP and an attorney.

MR. BOUDIN: Let me address myself to that, because that is where your Honor is wrong. I thought about it, obviously, I thought about it before I wrote my letter. What your Honor is going to do here is to direct in camera that counsel—just called counsel—can have access to these records. We are not going to publicize or give notice to anyone even that counsel has been given this, nor I assume will the Government give notice even that counsel—

THE COURT: You understand that, Mr. Stapleton?

MR. STAPLETON: Yes.

MR. BOUDIN: The question of which counsel associated with me can look at documents is a question completely within my office. It is not a matter of publicity. We don't announce who is going to look at it. It is simply that I as counsel for the plaintiffs will decide which the lawyers in my office—it happens to be one of these four—will be doing the work on the matter.

You mentioned a dual aspect. There is nothing dual about this, your Honor. Everybody has his own political affiliations, or almost everybody has, of one kind or another. And I don't regard that as creating

a dual loyalty. In this case, no matter what I may be elsewhere, I am only counsel for the plaintiffs and a member of the bar. My own political views and associations are completely irrelevant, and there is no dual responsibility.

THE COURT: In other words, you would vouch for Ms. Winter that insofar as the requirements of this case, insofar as obeying the orders of the Court, you would vouch for her that her prime loyalty in what we are talking about is to obey the Court's orders.

MR. BOUDIN: The only loyalty in this case is to Court and the case and to your Honor. There is no loyalty on her part to any organization as she acts as counsel here, any more than there is any loyalty on the part of other attorneys here who may have other associations. And I suspect that I have probably been charged with many more associations, mostly untrue, in the course of my lifetime. When I act as counsel, I act only as counsel and an officer of the Court. And I vouch that that will occur here.

MR. BRANDT: Your Honor, if I might just add—

THE COURT: Let me finish, I think you understand my problem, Ms. Winter. What I would like to know from you, and I am sure will be utterly frank with me, is there any problem at all, as far as you are concerned, with maintaining 100 percent all directions about confidentiality that I impose here? Is there any problem as far as you are concerned in

maintaining that, obeying that, even though you are a member of the Socialist Workers Party?

MS. WINTER: Your Honor, I have no problem with that whatsoever.

MR. BRANDT: Your Honor, may I just voice the Government's objection to the addition of the attorneys, in addition to our objection to the proceeding.

THE COURT: I thought you had voiced your objection in a letter.

MR. BRANDT: I just wanted to make it clear, being that we are discussing this particular matter of additional attorneys being given the identity of the FBI's eighteen informants. I just wanted the objection clearly stated for the record.

THE COURT: I think I understand you have objected entirely to this procedure, and I will assume that the record will reflect that. I will direct that the materials that I have referred to be made available to Mr. Boudin, Mr. Jordan, Ms. Pike and Ms. Winter. The order specifically covers now the eighteen files in question and the summaries thereof. Further applications may be made for further relief. I don't think we have to cover that now. As far as any files beyond the eighteen. I would want that subject to a further application.

I am specifically directing, and I will enter no further order, that the information contained in these files and in the summaries is to be given to absolutely no one beyond the four lawyers unless specifically permitted by the Court. The importance of this procedure is obviously known to the four lawyers and it is

known to Mr. Stapleton, who I think is the chief liaison with the lawyers for the plaintiff organizations. I specifically invited him today to be here, and I specifically authorized Mr. Boudin to keep him fully informed of our proceedings last time. I am directing that neither Mr. Stapleton nor the plaintiffs' lawyers make any statement whatever to the press about the procedure which we are using.

MR. BOUDIN: Nor the Government, of course.

THE COURT: Certainly the Government.

MR. BOUDIN: There is no advantage, I assure you.

THE COURT: Let us talk about the spirit of what we are doing. In this business of relations with the press, a lot of things can happen. The press can ask questions that put people in an awkward position, etc. The press may get wind of the public CIA and YSA rulings. They may ask—What about the FBI? And I really cannot sit here and enter a full set of orders which will be an absolute guarantee that the procedure will be never inferred or know to the press. I won't even try that.

So I want to ask you this, Mr. Boudin and Mr. Stapleton. Is it practical for Mr. Stapleton to be the only one in the plaintiff organizations who knows about our procedure.

MR. BOUDIN: I believe it is.

THE COURT: All right. Then I would ask and direct that that be done. Let us go to the spirit. The spirit of the thing is that we can work here and work in confidentially without publicity. So I would

suggest that if a question from the press arises, I am not putting words in anybody's mouth, but it seems to me a fair and accurate statement would be: the matter is still being handled in camera.

MR. BOUDIN: Exactly what I was about to suggest.

THE COURT: All right. That is as far as we will go.

MR. BOUDIN: We will say that if asked. If not asked, we couldn't say anything.

THE COURT: That concludes all I have to say.

MR. BRANDT: I take it that your Honor is entering his order as of the moment?

THE COURT: Yes.

MR. BRANDT: I would respectfully request a stay for two weeks.

THE COURT: For how long?

MR. BRANDT: For two weeks, your Honor.

THE COURT: I would be perfectly agreeable to granting a stay, but not for two weeks. It seems to me that you have known about this problem for some time. I would under no circumstances consider certification for appeal on this matter, that is, the FBI informant matter. I thought about it, and I believe it just does not warrant it. If the Government intends to seek an appellate remedy, then I assume it would be by way of mandamus. That is something the Government has every right to attempt.

I do think, Mr. Brandt, that I would expect that the Government could within a week decide what it

wants to do. And I realize that so much time has gone by, I don't mean to quibble with you, but I will try to save the week, if I can. I will grant a stay of this order until the end of the day June 7, 1977. That is Tuesday. That is exactly one week.

MR. BRANDT: We would appreciate the additional couple of days to resolve the matter, if that is what your Honor has decided, that a week you believe is sufficient, then that be it.

I would just like to say that we may come forward during the week with other applications to your Honor. And I would just like to keep that possibility open also, and just put your Honor on notice of that.

THE COURT: All right. I think this is all.

MR. BOUDIN: Can I just address myself to the first issue? I think your Honor has stated very clearly the effect that your Honor's CIA and NSA ruling would have on us. Bearing in mind your Honor's past observations, can I take it that we can I take it that we can expect here a certification of the issue?

THE COURT: I have to tell you that I have not really decided that.

MR. MOSELEY: Mr. Boudin would have the opportunity, your Honor, if a written decision were done, to move—

MR. BOUDIN: The opinion can also reflect it.

MR. MOSELEY: The Government, of course, would like to be heard if Mr. Boudin is going to make a formal application on the certification.

MR. BOUDIN: I can make a formal application, or I think so.

THE COURT: I think that when I get these rulings out we can have a conference without a lot of papers. I think we can decide it one way or another. I won't try to lay down anything now. I think I would like just a hearing, hear your viewpoint, hear the Government's viewpoint, and decide whether I would certify it under 1292(b) or not. I think we will leave it at that point. Thank you very much.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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73 Civ. 3160

SOCIALIST WORKERS PARTY, ET AL., PLAINTIFFS,

v.

ATTORNEY GENERAL OF THE UNITED STATES, ET AL., DEFENDANTS.

June 22, 1977
9:15 a.m.

Before:

HON. THOMAS P. GRIESA,
District Judge

APPEARANCES:

RABINOWITZ, BOUDIN & STANDARD, Esqs.
Attorneys for plaintiffs,

By: LEONARD B. BOUDIN, Esq.,
MARGARET WINTER, Esq.,
Of Counsel

ROBERT B. FISKE, JR., Esq.
United States Attorney for the
Southern District of New York,

By: WILLIAM BRANDT, Esq.,
STUART PARKER, Esq.,
THOMAS MOSELEY, Esq.,
Assistant U. S. Attorneys

(The following pages are sealed by order of the court).

THE COURT: I just want to get a brief report from first of all the government about any intention as far as appellate proceedings, so why don't you announce that.

MR. BRANDT: Your Honor, the government has, after several conversations, decided that it will file a petition for a writ of mandamus with the Court of Appeals.

THE COURT: When are you going to file it?

MR. BRANDT: We would like to file those papers on July 11, 1977. And if I can just briefly state my reasons for requesting that period of time. I have been handling the Socialist Workers Party case for the last approximately 15, 16 months. I will be leaving the United States Attorney's office on July 1st.

As a result, your Honor, that puts certain pressures on the other attorneys who are going to be working on the case.

Additionally, we have the July 4th weekend during that period, and I think that perhaps a day off for some of the people who have been working on the case would be appropriate.

So all we are asking for is July 11th. The total amount of time since we have access to the transcript, is only about five weeks between the time—

THE COURT: When did—

MR. BRANDT: Your Honor's order was theoretically entered on June 9th.

THE COURT: When was our hearing?

MR. BRANDT: May 31st.

THE COURT: May 31st was the hearing when I dictated?

MR. BRANDT: Yes, your Honor.

THE COURT: When did you get the transcript?

MR. BRANDT: June 7th, your Honor.

THE COURT: We are now at June 22nd.

MR. BRANDT: So we have really moved this along really quickly. We have taken two weeks to get the decision from the Solicitor General of the United States concerning our authority to file a petition, and we are really only asking for I guess a brief extension beyond that, another two and a half weeks, to file our brief.

THE COURT: The problem I have as far as timing is this, that what I was hoping could occur is that the plaintiff's attorneys could start very quickly in the review of these documents and that we could—assuming there was no order overturning my direction and we could just go along a normal course, I would have hoped that the review of the 18 or 19 files could take place really very quickly.

There are the summaries available, that can go fast. And then even the review of whatever other files would be reviewed by the plaintiff's attorneys could go forward during July and certainly—in a general way I was hoping to have this whole process over with this summer. I think we simply have to get this case to trial and I was hoping to have a fall

trial. All of that depends on getting the discovery over with this summer.

We really are, I think, basically finished with discovery, except for this matter of the FBI business. I am excluding for now the NSA and CIA for the moment. But there is a big job still to be done, however, the FBI materials are to be handled, whether it's the way I envision or some other way, a way directed by the Court of Appeals. But it's got to get over with. Summer is a very good time to get this spade work done.

So I don't want to lose any more of the summer than I can help. I know that the proceedings before me took a long time, because that was largely because the government came in with a claim of privilege without even looking at the documents and it took some time to get an analysis of the document, which I did regard and still regard as much more important than any other so-called factual submission given to me.

Consequently, the July 11th date, which puts it practically in the middle of July before you even file your mandamus, is, it seems to me, a little long. You have known of my ruling since the 31st of May. I grant that I edited the text of my remarks and you didn't have it until the 7th, but I do think that it just should not be all that cumbersome. I think the Court of Appeals handles mandamuses quickly and I think the parties should be prepared to handle them quickly.

What I will do is grant the government a stay of my order with regard to the FBI informants, I

will grant the government a stay pending the decision of the Court of Appeals in regard to their mandamus petition, providing that the mandamus petition is filed on or before the end of the day July 1, 1977. That's longer than I would like to give. I would much prefer to have the petition filed by the end of this week, I can see that that's probably impossible for you, you have been in Washington and I'm sure it's probably just impossible. But I see no reason that that mandamus petition cannot get filed by a week from this Friday. That will give us some possibility of having some progress this summer, even in view of the appellante proceedings.

MR. BRANDT: Your Honor, if I could brief just myself to your comments. Everybody I think is interested in expedition, the government is interested in expedition, plaintiff's counsel I believe is interested in expedition. In the ordinary mandamus situation there are certain outside pressures, a jury may be out, a case may be going to trial, there may be indeed Speedy Trial Act—

THE COURT: I have had plenty of mandamus petitions filed against me and they are usually not when juries are out.

MR. BRANDT: That's an extraordinary circumstance, your Honor. This is not just a procedural question. We think it goes beyond. This goes to the merits of certain of the plaintiff's claims.

As a result, your Honor, the type of briefing we believe this need to give the Court of Appeals what

we believe is the government's position, is rather extensive.

THE COURT: I adhere to my ruling. You have known of my ruling since May 31st.

MR. BRANDT: That's correct, your Honor. And we started—

THE COURT: The July 1st date—I'm not going to argue about it. If you want a further stay or different conditions, you will have to go to another court. I also wanted, and I know this is probably—it's difficult to handle all of this this morning, but I would like to see if we can make any progress on the question of whether Mr. Boudin is going to request any appellate review either by way of mandamus or by way of a 1292B request in regard to my CIA and NSA rulings.

MR. BOUDIN: May I respond to your Honor?

THE COURT: Yes.

MR. BOUDIN: I'd like to give your Honor a definite answer on Monday or Tuesday, but I think I can tell your Honor what my thought is now. It is one which will not delay any of the proceedings. In fact, my decision, such as it is, is based upon the fact that I am concerned if I do go to the Court of Appeals, asking your Honor to certify the issues.

I may find myself in a bog in the Court of Appeals and in the United States Supreme Court which would prevent the trial from occurring not only in the fall, but very frankly in January of 1978.

For those reasons our present inclination is the following, and I think we will hold to it. First, we

will not ask your Honor to certify the CIA matter. We will simply go to trial on whatever we have in this case against the CIA and are going to lack the benefit of the material which we sought to get, which your Honor made a ruling against us on. It will mean we will, I think, get some relief, we will have some evidence, it will not be what we had hoped, but that's part of life. It's only because it's so serious a decision that I want your Honor to give us until Monday or Tuesday for an answer.

THE COURT: No problem.

MR. BOUDIN: With respect to the NSA, our thought is this: I believe we have no evidence against the NSA in this case, or so unimportant that it would not be worth going to trial on, in the absence of a favorable ruling by your Honor.

Our inclination is to recognize this and have your Honor enter a judgment of dismissal of our suit against the NSA, thereby permitting us to take an appeal, assuming there will be a severance, to take an appeal on the NSA part without in any way delaying the trial against the CIA and the FBI and other agencies.

That seems to us, we have thought about it a great deal, to be the best way to preserve whatever we can against CIA and NSA and avoid any delay at all of the trial.

THE COURT: Why don't you consider that?

MR. BOUDIN: And we will advise you.

THE COURT: I won't attempt to discuss it with you until you have decided on your position.

MR. BOUDIN: Good.

THE COURT: Let me ask you this: This is getting a little out of my bailiwick, the government undoubtedly will pursue its intention of seeking mandamus on the FBI. Just for my contingent planning in the administration of the case, I assume that you would have the right in response to that to—well, I won't assume anything.

Do you consider that you have the right in response to that to challenge the aspects of that that are unfavorable to you? After all, there is a great deal of what you wanted that I denied, and my relief to you was of a very limited nature.

MR. BOUDIN: I would think so. Whether we would want to do that is another question.

THE COURT: That's really up to you.

MR. BOUDIN: Yes.

THE COURT: In other words, it could be that the result would be the Court of Appeals might open it up more than it is now opened up.

MR. BOUDIN: Could be, yes. It could be that it will be facilitated if we ask your Honor to certify that issue, the issue of the identity.

THE COURT: I wouldn't get into that.

MR. BRANDT: Your Honor, can I be just briefly heard on the matter that we discussed—

THE COURT: More on the schedule? I really cannot.

MR. BRANDT: Just looking at the schedule, your Honor, Friday is the 1st, and if we could just have sometime to the middle of next week—

THE COURT: The 1st is a week from this Friday.

MR. BRANDT: I understand that, your Honor, but the 2nd, 3rd and 4th are holidays. Nothing is going to happen between then—

THE COURT: I didn't want to inflict the cruel punishment of allowing you until the 5th, because that would be a nice way of rubbing—I like you fellows, and—

MR. BOUDIN: Your Honor actually advised us what the decision was going to be, on May 19th. It was on May 31st that it was repeated formally. But the government has now had a lot of time and gotten a lot of assistance—

THE COURT: That will stick. Let's not keep rehashing whether it's the 1st or after the 4th.

MR. BRANDT: It just seems to me that it would be in the government's best interest to have the additional time, and while we appreciate your concern for our vacation schedule, if you could just give us to sometime in the middle of the week that begins on July 3rd, that would be of help.

MR. BOUDIN: The government is always inching day after day.

THE COURT: No. Let's stick to that. If we are going to break that down, it will just be into next week and then farther into July, et cetera. I'd like to simply say one further thing about the FBI matter which I don't think I articulated, and I think it's quite important.

One of the things that is displayed in the 19 files which I have reviewed in camera and I have had summarized, one of the things which comes forth there is material dealing with the so-called international tendency, I think is the word for it. We all recall that at the time of the preliminary injunction motion in late 1974 the government claimed as a justification for infiltrating the upcoming convention that there was reason to suspect violent activity or planning of violent activity on the part of the Socialist Workers Party and to keep surveillance about such matters, for the following reason:

The claim was that the Fourth International had passed a resolution in 1969 at its world congress approving terrorism or violent revolution in Latin America, that the majority of the Fourth International had approved this motion. It was recognized that the United States party, that is, the Socialist Workers Party, had voted against that resolution and argued against it, but the government went on to contend that there were elements even within the Socialist Workers Party which espoused a revolution or favored violence or terrorism in Latin America.

This get rather complicated because of procedural problems in the Socialist Workers Party and the Fourth International, but the idea was that a minority within the Socialist Workers Party appeared to favor the pro violence resolution of the Fourth International.

If I recall correctly, the Court of Appeals relied on this to a substantial extent, relied on this argu-

ment of the government in reversing the injunction which I had entered. It was quite apparent that this was an area which required factual exploration in connection with the trial of this action.

This is not an area which is easy to deal with. It is not an area which is easy to get the relevant facts concerning. But the informant files are an important source of facts about that matter. And I discussed that in a general way at the April hearing when I was summarizing in a general way what was shown in the informant files.

I simply want to expand on that now by saying that certain of the 19 informant files contain reporting about meetings of this minority group within the Socialist Workers Party, which is called the Internationalist Tendency, I believe, that was organized by people who thought they favored the pro violence revolution. These informant files, therefore, in my view, contain important information on this issue which the Court of Appeals felt was important and which is important; that is, the extent of the influence of the pro violence group in the United States party, if any; what was discussed, what was done, what did the FBI know about the extent of pro violence, were there any plans of violent activity affecting the United States or any other country by this group or any other group in the Socialist Workers Party, or was it simply a discussion of other matters?

I say the latter, because from my review of these files it appears that although there was this thing called the Internationalist Tendency and although

there was the resolution by the Fourth International we talk about, I have read the material about the observations of discussions within the Internationalist Tendency; I have yet to read anything in these informant files indicating any planning of actual violence or discussions of actual violence among Socialist Workers groups in the United States.

I'm not saying that to make a finding of fact; there may be other information. All I am trying to indicate is that these without question constitute an important source of information about the extent of any discussions of violence or a lack of discussions of violence by this particular segment of the SWP. It contains an important source of information as to what the FBI knew about the actual facts about this Internationlist Tendency.

I want to add this as one important reason why these files are an absolutely indispensible source of evidence in this case and at the very least in my continuing view they should be furnished to plaintiff's counsel for this and other reasons. That terminates our conference.

MR. BRANDT: Your Honor, if I just may add one comment. One of the reasons the government was delayed in getting this showing was between May 31st and June 7th our notes didn't reflect some of the discussions of May 31st in the June 7th transcript.

I just would like to say that I find that the addition of additional findings by the court at this late date to be the type of thing that causes us to delay in terms of filing our brief.

THE COURT: I am perfectly aware that I edited my remarks. I know that. I am taking that into account in allowing you until July 1st. I think in the discussion I had with you on the phone yesterday I was inclined to give you only until the end of this week.

MR. BRANDT: That's correct, your Honor.

THE COURT: I wanted to have this hearing because I don't believe in having rulings like that over the phone, although we have dealt with this to some extent. But I wanted to have a full dress hearing and lay it out. I am giving you until July 1st in consideration of all the things we talked about.

This record will be sealed.

(Time noted: 9:45 a.m.)

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